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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1961

No. 641

ROBERT LUCAS, HELEN LUCAS, CYRENE D. LUCAS, ANNETTE LUCAS and CYRENE D. LUCAS, as guardian of the estates of Robert B. Lucas II, Cyrene Denison Lucas and James Lucas, minors,

Petitioners,

vs.

L. S. HAMM, FIRST DOE, SECOND DOE, THIRD DOE, FOURTH DOE and FIFTH DOE,

Respondents.

PETITION FOR WRIT OF CERTIORARI
to the Supreme Court of the
State of California

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Petitioners by their counsel pray that a writ of certiorari issue to review the decision of the Supreme

Court of the State of California, which decision affirmed the judgment of the Superior Court of the State of California, in and for the City and County of San Francisco. The decision and opinion of the Supreme Court of the State of California was filed and entered September 5, 1961. A petition for rehearing was timely made on September 20, 1961. The aforesaid petition for rehearing was denied by order dated October 4, 1961.

I.

OPINIONS BELOW

The opinion of the Superior Court of the State of California, in and for the City and County of San Francisco, in support of its judgment is appended hereto and marked Appendix 1. The judgment of the Superior Court of the State of California, in and for the City and County of San Francisco, which was appealed to the aforesaid Supreme Court of the State of California is appended hereto and marked Appendix 2. The opinion of the District Court of Appeal, First District, Division Two, of the State of California is appended hereto and marked Appendix 3. The aforesaid opinion is cited at 189 ACA 791. The decision of the Supreme Court of the State of California is appended hereto marked Appendix 4. The aforesaid decision is cited at 56 AC 604.

The petition for rehearing filed with the Supreme Court of the State of California is included in the record herewith and the portion thereof indicating

the presentation of the federal question is appended hereto marked Appendix 5. Said portions of the record are identified as page 1 and part of page 2 of the petition for rehearing.

II.

JURISDICTIONAL STATEMENT

The jurisdiction of the Supreme Court of the United States is invoked pursuant to the terms and provisions of 28 USCA Section 1257, Subdivision 3, and it is asserted that in violation of the Fourteenth Amendment to the United States Constitution petitioners have been deprived of property without due process of law and, in addition thereto, have been denied procedural due process of law.

III.

QUESTIONS PRESENTED

1. Does not the Fourteenth Amendment to the United States Constitution guarantee the right to a trial in a legal malpractice action involving negligence and a breach of contract asserted against a lawyer?

2. Inasmuch as questions of *negligence* and *breach of contract* depend for their solution upon *facts* established incident to *judicial procedure,* is it not denial of procedural due process in violation of the United States Constitution to decide these questions as a matter of law in the absence of *any* evidence?

IV.

STATEMENT OF THE CASE

Respondent L. S. HAMM is an attorney at law who has practiced in the City and County of San Francisco, State of California, for a period of time in excess of forty years. For a period in excess of thirty years this particular attorney at law represented a certain millionaire client. During the aforesaid representation, respondent L. S. HAMM was advised by said client that the assets of the client's estate exceeded several millions of dollars and that the client's primary purpose and intention was to transmit 15% thereof incident to valid testamentary instruments to certain underprivileged children whose names he indicated to respondent and those persons are the petitioners herein. Pursuant to the instructions of the aforesaid client and in conformity with agreements entered into by and between said client and respondent herein, respondent drew approximately five testamentary instruments purportedly reflecting the expressed wishes of said client. All of said testamentary instruments were void. They were drawn over a period of two years immediately preceding the demise of the testator. The terms and provisions of the aforesaid testamentary instruments violated the law of the State of California as codified in Sections 715.1, 715.2 and 716 of the California Civil Code and were in direct opposition to the case law upon the subject of future interests. If respondent L. S. HAMM had taken four and one-half minutes for research, he would have determined by perusal of the applicable

codified law of the State of California and the annotated cases thereunder that his selected phraseology was void. Respondent L. S. HAMM was handsomely compensated for his work. In each of the aforesaid testamentary instruments, he placed a provision in the will providing for a $25,000 tax-free bequest to said respondent. In addition thereto, he was assured if he survived the testator of receiving the statutory compensation payable to an attorney representing a fiduciary in the State of California. This compensation exceeds $50,000. Upon the demise of the aforesaid testator-client, said respondent offered the aforesaid testamentary instruments for probate without any effort to determine the validity of the provisions thereof. Said instruments were thereafter admitted to probate and an executor was appointed. The value of the probate estate exceeded $3,000,000. A will contest was instituted upon the ground of lack of testamentary capacity and the aforesaid contest was settled for the sum of $10,000. Incident thereto, respondent represented to the probate court that the settlement was beneficial to the estate and the court directed the payment of $10,000 upon the obtaining and filing of *appropriate* releases relative to the estate. In violation of the court order and his representations to the court, said respondent L. S. HAMM permitted counsel for the contestants to prepare an inadequate release which was thereafter filed and the payment of $10,000 was transmitted. Said respondent departed from customary procedure in the particular area in question in the State of California in that

releases and the terms and provisions thereof are always prepared by counsel for the defense, rather than counsel for the contesting persons. Prior to the order of court authorizing the payment of said $10,000 in satisfaction of the will contest, respondent was advised by competent counsel interested in said estate that the terms and provisions thereof were invalid and inadequate for the protection of the interests of the beneficiaries under the last will and testament of the decedent. Subsequent to the payment of the aforesaid $10,000 and the execution of the release by said contestant, the identical contestants again sued the fiduciary and the estate on the theory of invalidity of the last will and testament and codicils thereto and ultimately obtained approximately an additional hundred thousand dollars on a second settlement. Incident thereto, petitioners herein suffered a monetary loss of $15,000.

The will and codicils thereto, among other things, provided in part as follows:

> "The trust shall cease and terminate at twelve o'clock noon on a day five years after the date upon which the order distributing the trust property to the trustee is made by the court having jurisdiction over the probating of the wills . . ."

This provision violates the rule against perpetuities as enacted by the legislature of the State of California and a specific case relating to the particular point was decided several years before the drafting of the first will. The aforesaid case was annotated in the Code reflecting the statutory provision.

The aforesaid invalidity was the basis of the second attack upon the last will and testament and codicils of the aforesaid decedent and incident thereto it was determined by respondent that the provisions were invalid. As counsel for the fiduciary, and the draftsman of said instruments respondent thereupon directed a letter to the minor petitioners herein and their parents stating that his workmanship was void and, as a result thereof, petitioners who were not blood relatives would receive nothing unless they entered into a compromise agreement whereby they reduced their collective inheritance by the further sum of $75,000. As a consequence of the aforesaid opinion, petitioners entered into said agreement and thereafter received collective inheritances reduced by the sum of $90,000. Subsequent thereto, petitioners instituted an action for legal malpractice against respondent L. S. HAMM upon three theories, namely, breach of contract, negligence in the preparation of a will and negligence in the administration of an estate. The complaint alleged the aforesaid facts, among other things, and thereafter without an answer being filed demurrers were sustained without leave to amend and said minor plaintiffs, petitioners herein, were precluded from their day in court. The theory of the trial court is expressed in Appendix 1 attached hereto and was that there was no contractual relationship between a testator and a beneficiary and, therefore, the privity factor prevented this type of an action. Thereafter petitioners herein instituted an appeal to the District Court of Appeal and incident thereto the

aforesaid decision of the trial court was reversed upon the grounds, as indicated in Appendix 3 attached hereto, that the lack of privity did not prevent a beneficiary of a will from instituting an action against the lawyer-draftsman on the theory of negligence and also the theory of breach of third-party beneficiary contract. Further, the alleged negligence relative to the administration of the estate constituted a question of fact and should be tried by a court. In answer to the assertion of respondent L. S. HAMM that the rule against perpetuities was so difficult to understand that a lawyer should not be charged with negligence merely because he did not comprehend the significance thereof, the District Court of Appeal expressed its opinion in part as follows:

> "The law today has its specialties and even as the general practitioner in medicine must seek the aid of the specialist in his profession, so the general practitioner in law when faced with a problem beyond his capabilities must turn to the expert in his profession to the end that his client is properly served. Further, this argument is pointless here for, in the *Estate of Campbell* (1938) 28 C.A.2d 102 at 106, a similar provision was held to violate the rule against perpetuities and suspension of the power of alienation. All that respondent L. S. HAMM had to do in the present case was to examine the decisions of the courts of his own state and he would have had the answer to the problem which is now claimed to be confused and uncertain."

Thereafter respondent L. S. HAMM filed a petition with the Supreme Court of the State of California

for a hearing, which petition was granted. The Supreme Court of the State of California held that a beneficiary of a will has a cause of action against the draftsman for negligence in preparing an instrument if the beneficiary suffers a loss by virtue thereof both upon the theory of negligence and breach of third-party beneficiary contract. The Supreme Court of California further stated, however, that inasmuch as the rule against perpetuities is a difficult subject because Professor Leach of Harvard Law School so states, the conduct of respondent L. S. HAMM was not negligence as a matter of law and, therefore, the Supreme Court of the State of California affirmed the decision of the trial court. Without *any evidence* upon the subject, an appellate tribunal as distinguished from a trial court has decided that lawyers, as distinguished from doctors, architects, engineers and accountants, constitute in reality the "untouchables" of society and warrant an exception to the Fourteenth Amendment to the United States Constitution. This is so even though petitioners are children, their loss exceeds $90,000 and respondent was compensated in an amount exceeding $75,000 for draftsmanship that a second-year law student would understand was void.

Appendices 1, 2 and 3 indicate with clarity that until the case was considered by the Supreme Court of the State of California, a constitutional question relative to the Fourteenth Amendment to the United States Constitution was never posed. The decision of the Supreme Court of the State of California, Ap-

pendix 4 attached hereto, as it relates to the denial of a trial relative to questions of fact, demonstrates with clarity that in the entire proceedings this was the first time that there was any indication or demonstration of a violation of a constitutional privilege. Subsequent to the rendition of the aforesaid opinion of the Supreme Court of the State of California, Appendix 4 hereof, petitioners filed their petition for rehearing before the Supreme Court of the State of California wherein the decision was attacked upon the ground that it resulted in a violation of the Fourteenth Amendment to the United States Constitution. The aforesaid petition for rehearing was denied without opinion. The material portions of the aforesaid petition for rehearing are attached hereto as Appendix 5 hereof, and the entire petition for rehearing is a part of the record accompanying the within petition.

V.

LEGAL ARGUMENT

The decision of the Supreme Court of the State of California results in a clear violation of the Fourteenth Amendment to the United States Constitution. The Supreme Court of the State of California, *without any facts before it*, reached a decision that it is not negligence as a matter of law for a lawyer who has practiced in the metropolitan area of San Francisco, California, for a period in excess of forty years to make a mistake concerning which he was warned

in the second year of law school. This is so even though the mistake could have been avoided by pursuing the customary procedure of looking up the existing statutes and noting the annotations set forth in the Code which, in turn, would have indicated a case that had been decided in California in 1938, i.e., *Estate of Campbell* cited at 28 C.A.2d 102. The total time taken for this "research" would have been four and one-half minutes. The aforesaid "research" would have the effect of taking this lawyer by the hand and indicating why the very language he wanted to insert in the testamentary instruments was void and would be held illegal by a court. This particular lawyer was handsomely compensated by receiving a tax free legacy of $25,000 in addition to another $50,000 anticipated probate fee relative to a $3,000,000 estate. The element of urgency was not present because the preparation of the instruments was accomplished over a period of years and the lawyer was advised by the client over a period of many years of the extent of the estate and the specific wishes of the client. The Supreme Court of the State of California disregarded its duty to petitioners herein who are children in failing to protect their interests and permitting them to lose sums in excess of $90,000 without any inquiry into the facts of the case.

The Fourteenth Amendment to the United States Constitution provides that no state shall deprive any person of life, liberty or property without due process of law. This protection is against judicial procedure, which by reason of denial of opportunity for a hear-

ing, unfairly deprives a person of property. The prohibitions set forth in the Fourteenth Amendment extend to all acts of the state, whether through its legislative, executive or judicial authority. *Scott v. McNeal* (1894) 154 U.S. 34, 14 Supreme Ct. 1108; *Virginia v. Rives,* 100 U.S. 313, and *Neal v. Delaware,* 103 U.S. 370.

It is clear that petitioners herein were deprived of an opportunity for hearing at which time all evidence relative to the issues framed by the pleadings would be adduced and weighed by the trier of fact. It is fundamental that the right to a hearing includes the right to produce evidence and to cross-examine adverse witnesses, including the parties to the action. *Fewell v. Fewell* (1943) 23 Cal.2d 431.

Issues of fact exist in this case. There are at least one thousand questions of fact, the answers to which would determine the ultimate question of negligence or the lack of it and/or breach of contract. C.C.P. 592 of the State of California concerns issues of fact. The right to a trial by jury is the right to have the jury try and determine issues of fact. C.C.P. 590, 592, 2101.

The jury as a fact-finding body occupies so firm and important a place in our system of jurisprudence that any interference with its function in this respect must be examined with utmost care. *Dorsey v. Barba* (1952) 38 Cal.2d 350, 356.

If the determination of fact is based on no evidence at all or upon evidence so unsubstantial under the circumstances that it is deemed equivalent to no evi-

dence, there is a deprivation of due process. In other words, due process requires that the determination be based upon substantial and legally competent evidence. *Walker v. San Gabriel,* 20 Cal.2d 879; *Universal Camera Corporation v. N.L.R.B.,* 340 U.S. 474, 71 Supreme Ct. 456, 95 Lawyers Edition 456.

In the State of California it is fundamental that negligence may be pleaded in general terms. *Rannard v. Lockheed Aircraft Corporation* (1945) 26 Cal.2d 149 at 151. It is also basic that evidentiary matter may not be pleaded. Could it have been the position of the Supreme Court of the State of California that if the pleadings in question merely charged the lawyer with "negligently preparing a will" the case could not go to a trial court for determination? Does the inclusion of the void clause without alleging evidentiary matters relative to the facts of the particular case constitute an exception to the aforesaid rule of pleading in the State of California? How does one distinguish this type of case from medical negligence cases? Are these children in their efforts to recoup the lost $90,000 to be barred from having evidence introduced in their behalf showing that respondent herein as an attorney held himself out to be an expert in the field of trusts; that he did or did not read the law upon the subject, or that he did or did not promise to prepare legal and valid wills? Can it be known at this stage of the proceedings whether the client for the huge fee involved requested the services of an expert?

Negligence is a relative term. Therefore, by the very definition it can only be determined by the trier of

fact. An appellate court is not a trier of fact. It can find and determine only after evidence has been adduced incident to a hearing afforded all parties pursuant to all applicable law. The word "relative" as it is used in the field of negligence means relative to all facts and circumstances, such as experience of the lawyer, standard of care in the community in question, importance of the task undertaken, time available for the accomplishment of the task, remuneration paid for the legal services, efforts made by the lawyer to acquaint himself with the problem and the applicable legal principles, or as the District Court of Appeal stated, *"Did he read the law?"*, whether he consulted experts, whether he held himself out to the public or this particular client as an expert, what the average practitioner with forty years of experience would have done in the City and County of San Francisco, State of California, during the times in question for the equivalent of a $75,000.00 fee. Would the average practitioner have the trust provisions checked by an expert? Did the lawyer do so in this particular case? Are there experts or specialists in the field of probate, trusts and wills in San Francisco, California? The foregoing and a thousand other questions are material to the determination of whether or not this lawyer, respondent herein, was guilty of negligence. To deprive the children, petitioners herein, of their fundamental right of inquiry is to violate the most sacred right guaranteed citizens of the United States by the United States Constitution.

"Skill" is something more than the minimum competence required of any person who does an act. *Re-*

statement of the Law of Torts (2) Section 299 A. A person as a member of the legal profession duly licensed to practice law holds himself out to the public as having the requisite skill to practice it. He must, therefore, possess and exercise it. The word "skill" includes not just manual dexterity, but also knowledge and training suitable for the particular task demanded by the client and also commensurate with the remuneration and foreseeable results if an error is committed. This is a question of fact in each particular case to be determined by the trier of fact after *all* the evidence is adduced in a court constitutionally constituted as a trial court as distinguished from a forum limited jurisdictionally and otherwise to appellate function.

The skill and knowledge of the average member of the legal profession in the area of San Francisco, California, at the time in question must be determined by adducing evidence and not by the conclusions of an appellate tribunal, the members of which have not practiced law for at least twenty years. The standard is not what was known or done twenty years ago, but rather what was known or done in San Francisco, California, during the times in question, i.e. 1955 and 1956. Furthermore, the immediate reaction of the three learned members of the District Court of Appeal, all of whom practiced law in San Francisco, California, and practiced more recently than any member of the Supreme Court of the State of California, was that all the attorney in this particular case had to do was to read the law of his own state or consult an expert or specialist in the field. These children

have been prevented from showing by competent evidence that this lawyer didn't even open a law book incident to his employment.

The errors committed in this case are not errors of judgment because the case law in the State of California is right in point and clear. A second-year law student could understand the *Estate of Campbell,* supra. If there cannot be any dispute relative to the interpretation of this case, there cannot be an error of judgment. Even in cases relating to an error in judgment in all fields of negligence it is proper to show that there would not have been the necessity for resorting to judgment *if* the party charged with negligence merely complied with the minimum standard of care in the community in effect at the time in question. If the attorney in the instant situation had merely read the codified law of the State of California and the annotated case cited therein, to wit, the *Estate of Campbell,* it is obvious that the mistakes would not have been made.

Negligence is either the omission by a person to do something which an ordinarily prudent person would have done under *given circumstances* or the doing of something which an ordinarily prudent person would not have done under such circumstances. It is not absolute or to be measured in all cases in accordance with some precise standard but always relates to some circumstances of time, place and person. *Tucker v. Lombardo* (1956) 47 Cal.2d 457 and 462; *Restatement of Torts* Section 282. Under the prevailing view of the California courts, each issue in a negligence case

is a question of fact. A defendant in a negligence action will be required to use any special knowledge which he actually does or should possess. Furthermore, he is required to apply any specific knowledge however obtained which would affect his conduct under the circumstances. *Prosser on Torts,* Second Edition, pages 132-135. Certainly, in this case it is the constitutional privilege of the petitioning minors to show that the respondent attorney had special knowledge upon the subject of trusts and he held himself out as an expert in this field. Obviously, it is not the position of the Supreme Court of the State of California that evidentiary matters must be pleaded in a legal malpractice action but not in a medical malpractice action.

In regard to negligence of a professional person, we do not judge ordinary care but rather *skill.* Skill is a relative term. The skill of a practitioner with one year of experience differs from the skill of a practitioner with forty years of experience. The skill of a lawyer who has drawn one will and has probated one estate is to be distinguished from the skill of a lawyer who has drawn a thousand wills and probated 500 estates. The skill required of a lawyer who is paid $50 for preparing a will is to be distinguished from the required skill of a lawyer paid the equivalent of a $100,000 fee for his craftsmanship. The skill of the draftsman who is informed that the assets of the estate are worth $1,000 must be different from the skill required concerning an indicated estate of several million dollars.

A professional service is composed of learning and skill. If a person offers a certain service he must apply to it his special education, experience and skill. A special amount of skill and knowledge will be imposed regardless of whether the lawyer actually has it so long as he holds himself out as being a certain type of professional man. These are matters that depend upon questions of fact. What type of service did this attorney represent he was qualified to perform? Isn't that question vital to the determination of negligence and breach of contract? To prevent these children, petitioners herein, from establishing these basic facts is to deprive them of due process of law in violation of their sacred constitutional rights. The Supreme Court of the State of California has invaded the province of the trier of fact. The United States Constitution forbids this.

The question of whether an attorney has breached the standard of conduct is treated as one of fact for the jury. *O'Neill v. Gray,* 30 Fed.2d 776; *Walker v. Goodman & Mitchell,* 21 Ala. 647; *Hempel-Lawson Merc. Co. v. Poe,* 169 Ark. 840; *Cochrane v. Little,* 71 Md. 323; *Parker-Smith v. Prince Mfg. Co.,* 158 N.Y. 346; *Stein v. Kremer,* 112 N.Y.S. 1087; *Mercer v. King,* 1 F. & F. 490, 175 Eng. Rep. 822. In the State of California in the early case of *Gambert v. Hart,* 44 Cal. 542, the court held that *when the facts are ascertained* the question of negligence is a question of law for the court. This decision was rendered in 1872 and the writer disagrees with the decision and

asserts that under the same set of facts today the case would be overruled. However, even in that case note the important qualification, to wit, "When the facts are ascertained . . ." What facts have been ascertained in this case? The court does not even know whether the testator inquired of this attorney relative to his status as a specialist in the field of trusts or whether there were any conversations relative to consultation with an expert.

Negligence, especially in this type of case, is not an absolute term, but rather a relative expression. In deciding whether or not negligence occurred in a given case, the conduct in question must be considered in the light of all the surrounding circumstances as shown by the *evidence*. This rule rests on the self-evident fact that a reasonably prudent person will react differently to different circumstances. These circumstances enter into, and in a sense are, a part of the conduct in question, whether the cause of action sounds in tort or contract. Both causes are involved in this case and were recognized by the Supreme Court of California in its decision. In regard to the contract cause of action, what was the agreement? Are these children to be prevented from proving by competent evidence that the testator, for a considerable fee, contracted with respondent as a lawyer to prepare testamentary instruments in conformity with the existing law, both statutory and case, upon the subject of trusts? What kind of a will is an illegal will? Before it can be determined whether there was

a breach of contract or excuse therefor, the terms must be determined by competent evidence. Why can't these children have their day in court?

The amount of caution required in each case, whether it be in tort or contract, varies in proportion to the danger of a mistake, the amount involved and the size of the estate, among other things. This is the same principle applied in all negligence cases. *Cucinella v. Weston Biscuit Co.*, 42 Cal.2d 71.

The points hereinabove set forth are basically the answers to the strange conclusion of the Supreme Court of the State of California, the effect of which is to constitute the legal profession the "untouchables" during a period when medical malpractice cases are considered by juries every day. When the Supreme Court of the State of California commented in its decision about the error "if any" contained in the will, it certainly forgot that either the provision is void (in which case the lawyer is guilty of negligence and breach of contract), or if it is not void the lawyer is still liable for negligence in advising his clients, the petitioners herein, that his workmanship was void and a loss was necessary in order to salvage any of the inheritance.

How can the Supreme Court of the State of California say what would or would not be proper in regard to holding that this respondent failed to use such skill, prudence and diligence as lawyers of ordinary skill and capacity commonly exercise? There is absolutely no evidence in the record and there was certainly no evidence before the Supreme Court of the

State of California relating to the elements of skill, prudence and diligence required under the circumstances. Further, there are no litigated cases upon this subject. Hence, the field of judicial notice is not available. The only method of establishing what would have been the required skill, prudence and diligence is to take evidence upon the subject. What would the ordinary lawyer in San Francisco, California, in 1955 and 1956 have done under the circumstances, to wit, a $3,000,000 estate involving anticipated fees of at least $75,000.00? Would a practitioner with forty years of experience have consulted a specialist or would he have taken four and one-half minutes to look up the law? Certainly, the Supreme Court of the State of California is charged with knowledge that in San Francisco, California, at the time in question there were specialists in the field of trusts, wills and probate, and other fields. Does the Supreme Court of the State of California know whether this lawyer was such a specialist?

The Supreme Court of the State of California held as a matter of law that an attorney is not liable for being in error as to a question of law on which reasonable doubt may be entertained by well-informed lawyers. Who said that well-informed lawyers in San Francisco, California, in the years 1955 and 1956 had any doubt upon this question? Where is there any evidence upon this fact? Rather, is it not the fact that the Supreme Court of the State of California has prevented these children, petitioners herein, from producing the testimony of well-informed San Fran-

cisco lawyers who would testify to the practice of looking up the law and indicating whether they, as distinguished from textbook writers, considered the field too difficult.

The question presented in this case does not relate to the entire field of future interests or rules against remoteness of vesting. Instead, it relates to a simple segment, i.e., the administrative contingency, a basic pitfall to which the attention of all law students is directed and one which should be remembered by all who attempt to draw testamentary instruments involving millions of dollars wherein trust provisions are included. References to the works of Professor Leach wherein the general field of future interests is discussed are entirely beside the point. Each general subject of law has its obvious and obscure facets. However, the specific error assigned to respondent's conduct is of the more obvious variety, to wit, that a trust must terminate upon an event certain. Therefore, what a professor of law in Massachusetts who has never practiced in the geographic area in question believes is difficult is entirely immaterial. The only qualified expert would be a San Francisco lawyer with like qualifications and having acted under similar circumstances. These children are entitled to his opinion. In the absence thereof, the comments of the Supreme Court of the State of California are purely conjectural, without any reference point either in precedent, experience or fact. Certainly the Supreme Court of the State of California is not advocating that lawyers should take our law from textbooks rather than the

constitutional arena where it is made. The legislature passed the law in question. The courts of California have conveniently interpreted the law in simple language for the assistance of any lawyer who merely does his required duty incident to research.

The function of the Supreme Court of the State of California is to review errors of law and/or pass on questions of fact relating to asserted lack of substantiality of evidence. First, however, there must be *fact* and fact can only be established by evidence. 3 Witkin, Procedure, 2225.

The members of the Supreme Court of the State of California and Professor Leach believe that the subject under discussion is so technical that a lawyer can make a mistake therein and, although his workmanship is void and unenforceable by a Court, the beneficiaries of the will who suffered by his carelessness cannot recover damages. Did the aforesaid court mean any lawyer regardless of his qualifications or representations?

There is a shocking difference in the conclusions reached by the members of the District Court of Appeal, 189 ACA 791, with the conclusions reached by the members of the Supreme Court of the State of California. The important criterion in weighing the difference of opinion is that each member of the District Court of Appeal who participated in the determination of this case actively practiced law in San Francisco, California, within a reasonable time prior to the rendition of the decision and it is believed that

each member of said District Court of Appeal is more nearly Mr. Average Practicing Lawyer in San Francisco, California. Since there is no judicial precedent relative to the facts of this case, it is respectfully submitted that each member of the District Court of Appeal would qualify in regard to what the average San Francisco lawyer would have done under the circumstances. The opinion of the District Court of Appeal is set forth in Appendix 3 hereof.

No judgment of a court is due process of law if rendered without jurisdiction in the court. The words "due process of law", when applied to judicial proceedings, mean a course of legal proceedings according to those rules and principles which have been established in our system of jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity, there must be a tribunal competent by its Constitution, that is by the law of its creation, to pass upon the subject matter of the suit. *Scott v. McNeal,* supra; *Pennoyer v. Neff,* 95 U.S. 714. It is axiomatic that an appellate tribunal cannot be a fact-finding forum absent *any* evidence in the record. What authority did the Supreme Court of the State of California assert in support of substituting its wisdom for the evidence that would be adduced before the trier of fact? Certainly, the aforesaid forum isn't the trier of fact by Constitution, consent or delegation. If it is the opinion that said court actually did weigh the facts in this case, precisely what facts were considered by the Supreme Court of the State of California? The rights herein as-

serted are basic in a free society and the very essence of a scheme of ordered liberty. To abolish them is to violate a principle of justice so rooted in the traditions and conscience of our people as to be ranked fundamental.

The Supreme Court of the State of California lacked jurisdiction over the subject matter, i.e., determination of questions of negligence and breach of contract, because there is no evidence in the record and an appellate court is not empowered to make findings of fact in the absence of evidence. Therefore, it is clear that the decision violates the constitutional rights of petitioners herein as set forth above.

The Supreme Court of the State of California in rendering the aforesaid opinion and judgment conceded that petitioners herein possessed a contract right and that the breach thereof resulted in monetary damages to petitioners. Apparently, said court forgot, however, the contract theory because a contract is to be interpreted according to the law and usage of the place where it is to be performed or where it was made. *Civil Code* Section 1646. Therefore, a contract concerning the preparation of numerous testamentary instruments must be interpreted by the trier of fact in relation to the metropolitan area of San Francisco, California, during the years 1955 and 1956. Under the circumstances alleged in the complaint, does the aforesaid Supreme Court of the State of California assume that it could not be proved whether the defendant attorney, respondent herein, promised to prepare a will in conformity with good practice in

effect at the time in question? Does said court indulge in speculation concerning the promises that petitioners could prove had been asserted by respondent lawyer incident to the preparation of the wills in question? Are petitioners precluded from proving that the testator, because of the size of his estate and the unusual manner of disposition and compensation, discussed in detail with defendant lawyer, respondent herein, the subject of the field of trusts, and the principles of the rule against perpetuities?

The settled judicial construction of a constitutional provision or a statute, so far as the contract rights are thereunder acquired, is to be deemed a part of such provision or statute and enters into and becomes a part of the obligation of the contract and no subsequent change in construction can be suffered to defeat or impair the contract. *Douglass v. Pike County,* 101 U.S. 677, 25 L.Ed. 968, and cases cited; *Louisiana v. Pillsbury,* 105 U.S. 278, 26 L.Ed. 1090; *Los Angeles v. Los Angeles City Water Co.,* 177 U.S. 558, 44 L.Ed. 896.

The third cause of action pleaded an agreement for the payment of a specific sum of money in exchange for the execution of an *appropriate* release to be approved by the court and the breach thereof. Again, the circumstances surrounding the transaction, when combined with testimony of other lawyers relative to standards of care, must be considered by the trier of fact prior to the final determination of negligence and/or breach of contract. It was pleaded that the condition precedent to the payment of any sum of

money was the execution of an *appropriate* release. The word "appropriate" is defined by Webster's Dictionary as "proper" and "to make suitable." It is clear that whether this was an appropriate release under the circumstances is a question of fact. Petitioners are entitled to their day in court on this issue.

Lawyers are entrusted with a sacred duty to country, court and client. Any deviation therefrom is a breach of trust. If there is any doubt about the breach of trust, it should be decided by the lawyers against the lawyers. This is the way democracy is proved and perpetuated. To accomplish the moral and equitable result even though it hurts must be our mission. We cannot, as a professional group, permit children to lose sums in excess of $90,000 and thereafter compound the tragedy by blocking them from having their day in court. The result is shocking to the conscience of the legal profession and this type of protection is not desired by any member of the legal profession. Actually, is there one valid, moral, ethical or legal reason why these children should not have their day in court in order to produce evidence concerning the gross negligence of this lawyer and the promises he made to the testator concerning his expertness relating to testamentary instruments for which he received total fees of approximately $75,000? Possibly, after all the evidence has been adduced a finding of no negligence and no breach of contract could be supported by the facts of the case, but first let's give these young Americans, our future citizens, their first lesson in democracy and the meaning of the

United States Constitution by adherence to the principles for which their forefathers fought and died.

The inherent evils of a system whereby lawyers are tried by lawyers is analogous to the pre-World War II military justice procedures whereby enlisted men charged with offenses against officers were tried by officers. This evil was corrected by the new uniform code of military justice. The startling result of the decision of the Supreme Court of the State of California must also be considered in the light of its impact upon the right of a party litigant to challenge for cause a jurist or a juror. This sacred right has been summarily taken away from these children without any comment or explanation by the Supreme Court of the State of California.

It is certainly fundamental that a dissertation on legal philosophy is not necessary to show the unconstitutionality of this decision. Common sense indicates the necessity for lawyers to take the same risks as other members of society and why not? We are hired for one basic reason. The law is purportedly too complex for the average lay person to understand. Therefore, we, as members of the legal profession, should fulfill the mission and not scurry for shelter when our negligence and error result in harm to others. The profession of law is proud of its honorable achievements and it certainly does not want its members to be white-washed in secret sessions. This is cowardly and lawyers are not and should not be cowards. Just as in the situation involving medical malpractice cases, lawyers who assume the risk in-

herent in their workmanship must assume the responsibility therefor. The most important function of a lawyer considered in the light of the impact of his activities upon the general economy of the country is the preparation of wills. This function affects hundreds of thousands of lawyers in the United States each year and relates to the transfer of hundreds of millions of dollars annually. Consequently, this field should be doubly protected against policing by fraternity brothers. Merely to consider the premise obtains the solution. Why should we, the untouchables, as lawyers be treated in a manner different from doctors, accountants, architects, engineers and other members of professional classes?

This is a case of first impression in the United States and it demands disposition pursuant to constitutional guarantees. The Supreme Court of the State of California has decided a federal question of substance not theretofore determined by the Supreme Court of the United States and, in addition thereto, has attempted to decide it in a way probably not in accord with applicable decisions of the Supreme Court of the United States. Furthermore, the aforesaid state court has decided an important question of federal law which has not been but should be settled by the United States Supreme Court. Academic speculation predicated upon philosophical conjecture of a Harvard Law School professor and other writers who comment generally upon the problems of common law restraints is not a competent or material factor to consider in this case. We are not considering the

common law. We are confronted with a clear and concise statute with a specific case assisting in interpretation worded in a manner that a beginning law student could understand and abide by. The profession of law has been subjected to considerable criticism during the past twenty years during which time the medical profession has been ripped apart by lawyers incident to hundreds of malpractice cases. What will the impact of this case be upon other professions? Any lawyer hereafter accused of carelessness will merely shrug his shoulders and say, "The subject is really rather difficult", and quote with a smirk the famous case of *Lucas v. Hamm* decided by the Supreme Court of the State of California. Doctors will unsuccessfully beg for the same immunity, and juries will be told that we who prosecute are constituted the "untouchables" not by the United States Constitution, not by the legislature, but by self-decreed proclamation.

This case will be reviewed by many writers and considered by courts throughout the United States. The impact thereof affects hundreds of thousands of lawyers in the United States and the dignity sought by members of this honorable profession will be seriously impaired if the constitutional rights and privileges afforded citizens, especially children as in this case, are summarily thrown out in any case where the impact affects our own clan.

As lawyers, in our efforts to improve the administration of justice pursuant to Canon 29 of the American Bar Association Canons of Ethics, we must be

doubly careful to avoid partiality to our own members because we are actors in this drama.

For the foregoing reasons, the Supreme Court of the United States should issue a writ of certiorari in order that this case may be reconsidered and decided commensurate with principles of law applicable thereto and in accordance with the constitutional guarantees incident to the Fourteenth Amendment to the United States Constitution.

Dated: December 20, 1961.

REGINALD G. HEARN,
Attorney for Petitioners.

(Appendices Follow.)

Appendix 1

Superior Court
Orla St. Clair, Judge
San Francisco

February 20, 1959

Reginald C. Hearn
Attorney at Law
351 California Street
San Francisco, Calif.

Angell, Adams, Gochnauer & Elder
B. E. Kragen
Attorneys at Law
200 Bush Street
San Francisco, Calif.

Re: *Lucas v. Hamm, et al.*—No. 483685

Gentlemen:

It seems clear to me that *Biakanja v. Irving*, 49 Cal. 2d 647, did not completely overrule *Buckley v. Gray*, 110 Cal. 339. In fact, the Biakanja case expressly says that Buckley v. Gray, and another like case, are only disapproved "insofar as they are in conflict with this decision."

The only conflict that I can find between the Biakanja case and the Buckley case is that the Biakanja case says that the extension of recovery despite the absence of privity is not limited to the two classes referred to in the Buckley case.

The Supreme Court in the Biakanja case, page 650, specifically says that the question of whether the ex-

tension of liability to a third person not in privity is a matter of policy involves the balancing of the various factors referred to therein.

It seems clear to me that the simple allegation of negligence as presently contained in the complaint does not take the plaintiffs out of the Buckley case. I am going to give plaintiffs the right to amend, if plaintiffs feel that they should amend, to attempt to show wherein, as a matter of policy, the liability should be extended to the class in which the plaintiffs find themselves. Of course, if plaintiffs do not desire to so amend, they may simply let the time go and we arrive at the same position as though the demurrer had been sustained without leave to amend.

The demurrers are sustained with ten days to amend.

Very truly yours,

/s/ Orla St. Clair

STC/gs

Appendix 2

Philip H. Angell
Scott Elder
Angell, Adams, Gochnauer & Elder
200 Bush Street
San Francisco 4, California
YUkon 2-4151

B. E. Kragen
988 Market Street
San Francisco, California
PRospect 5-6561

Attorneys for Defendant
L. S. Hamm

In the Superior Court of the State of California
in and for the City and County of San Francisco

No. 483685

Robert Lucas, Helen Lucas, Cyrene D. Lucas, Annette Lucas, and Cyrene D. Lucas as Guardian of the Estates of Robert B. Lucas II, Cyrene Denison Lucas and James Lucas, Minors,
Plaintiffs,

vs.

L. S. Hamm, First Doe, Second Doe, Third Doe, Fourth Doe and Fifth Doe,
Defendants.

JUDGMENT AFTER ORDER SUSTAINING DEMURRER WITHOUT LEAVE TO AMEND

In this action the defendant L. S. Hamm, by his attorneys Messrs. Angell, Adams, Gochnauer & Elder and B. E. Kragen, having appeared and demurred to the plaintiffs' second amended complaint herein, and the issue of law thereto arising having been duly submitted to the court by the defendant, and the court being fully advised in the premises did, heretofore, to wit, on the 24th day of June, 1959, sustain said demurrer, and refused leave to plaintiffs to amend their complaint.

Now, Therefore, It Is Ordered, Adjudged, and Decreed that plaintiffs take nothing by this action and that said defendant L. S. Hamm have and recover his costs herein taxed at $.....

Dated this 30 day of June, 1959.

Orla St. Clair
Judge of the Superior Court

Endorsed
Filed
Jun 30 1959
Martin Mongan, Clerk
By J. L. Perusio
Deputy Clerk

Appendix 3

In the District Court of Appeal
State of California
First Appellate District

Division Two

1 Civil No. 18,966

Robert Lucas, Helen Lucas, Cyrene D. Lucas, Annette Lucas, and Cyrene D. Lucas, as Guardian of the Estates of Robert B. Lucas II, Cyrene Denison Lucas and James Lucas, Minors,
Plaintiffs and Appellants,
vs.
L. S. Hamm,
Defendant and Respondent.

Opinion

This is an appeal from a judgment of dismissal entered after an order sustaining without leave to amend defendant L. S. Hamm's demurrer to plaintiffs' second amended complaint.

The appellants are beneficiaries under the last will of Eugene H. Emmick, deceased. Respondent L. S. Hamm is a practicing lawyer in San Francisco, and has been engaged in his profession for more than 40

years last past. The complaint, which is phrased in three counts, seeks to recover damages from respondent and others for malpractice and breach of contract in the drawing of the will, and negligence in certain proceedings in connection with the handling of the estate.

The first cause of action speaks in negligence and alleges that appellants and others are beneficiaries under the will of Eugene H. Emmick, and that respondent, as attorney for Emmick for approximately 30 years and thoroughly familiar with his estate and his expressed desire and direction that appellants receive by testamentary instruments specified portions of his estate, prepared the said will; that paragraph Eighth of the will set up a residual testamentary trust of which the appellants were beneficiaries, and subdivision (c) thereof stated: "This trust shall cease and terminate at 12 o'clock noon on a day five years after the date upon which the order distributing the trust property to the trustee is made by the Court having jurisdiction over the probation of this will . . ." The complaint then goes on to allege that this provision was invalid by virtue of the following Civil Code sections: 715.1 (restraints upon alienation), 715.2 (rule against perpetuities), and 716 (suspension of the power of alienation); that the respondent was negligent in so drawing the will and that by reason thereof an attack was made thereon, which involved the said residual trust; that respondent advised appellants that the said provision of paragraph Eighth was

invalid for the reasons aforementioned, and that appellants, who were designated beneficiaries thereunder, would be deprived of the entire inheritance to which they would have been entitled but for this invalid provision, and that unless they compromised the matter with the blood relatives of the decedent they would receive nothing under the will and codicils of Emmick; that he advised a settlement whereby appellants would accept an inheritance of $75,000 less in amount than that to which they would otherwise have been entitled; that guided by said advice and recommendation appellants did so settle the matter, to their damage, in the said sum.

The second cause of action is based upon the theory of the third party beneficiary contract entered into between Emmick and respondent Hamm for the benefit of the appellants. It incorporates all of the allegations of the first cause of action and then alleges that decedent entered into an oral contract with respondent Hamm whereby respondent agreed to and did prepare the will and codicils thereto wherein Emmick was testator and appellants were designated as beneficiaries of the residual trust therein created; that the respondent was duly compensated therefor, but that in carrying out the said contractual employment respondent negligently performed his duties in that he included an invalid provision in the will which rendered the residual trust null and void, and prevented the carrying out of the testator's expressed intent and direction to respondent that appellants receive by way

of said trust a specified portion of his estate, and that by reason of respondent's breach of the contract appellants were damaged in the sum of $75,000, for which they seek judgment.

The third cause of action again incorporates all of the allegations of the first cause of action and then continues to recite that subsequent to the admission to probate of the will and the codicils thereto of decedent, certain persons instituted a will contest and that thereafter the contestants and respondent arrived at a settlement of the said contest, wherein the parties agreed that upon the payment of $10,000 the contest would be dismissed and appropriate releases given by said contestants, the settlement to be subject to the approval of the probate court; that in carrying out the settlement respondent and others were again negligent in that they caused to be executed releases which did not protect the interests of the estate and those interested therein in that they did not preclude said contestants from making another attack upon the estate and the interests of the named beneficiaries therein, with the result that said contestants did challenge the validity of the testamentary instruments; that said proposed releases were submitted before execution to other counsel for their comment, who advised respondent and others of the lack of protection afforded thereby to the estate and the persons interested therein, and proposed certain phraseology that should be included in said releases to properly guard the interests of the estate and those interested

therein, but that said advice and suggestion was completely ignored by respondent and others, and that said probate court, without being advised of the failure in the terms of said proposed releases, approved the settlement as presented by respondent and others; and that by reason of said negligence appellants suffered an additional monetary loss of $15,000, for which damages they ask recovery.

Respondent L. S. Hamm interposed a demurrer, both general and special, to said second amended complaint. On this appeal, respondent has argued his position solely upon the basis of his general demurrer, hence the only question involved is whether the appellants have stated facts sufficient to constitute a cause of action.

The appellants frankly state that they rely solely upon the case of Biakanja v. Irving (1958), 49 Cal. 2d 647, 651, which they contend overrules the authority of Buckley v. Gray (1895), 110 Cal. 339, or, as the appellants succinctly state it—unless Biakanja overrules Buckley, the complaint does not state a cause of action.

Basically the respondent's position, except for his contention that in view of the subject matter involved he could not be held negligent, is that Buckley has not been overruled by Biakanja, and the judgment must be affirmed.

Buckley v. Gray, supra, laid down the rule that legatees of a will could not sue an attorney for negligence in the preparation of the will which caused in-

jury to them, since there was no privity between the attorney and the legatees, and hence no duty existed on the part of the attorney toward the legatees; and further, that the legatees possessed no rights as third party beneficiaries to maintain an action for damages resulting from a breach of the contract between the attorney and the client who employed him to draw the will because in the contemplation of section 1559, Civil Code, the contract was not one made expressly for their benefit.

It is apparent that if the Buckley case is still the law, appellants are without remedy.

However, in Biakanja v. Irving, supra, where a notary public had negligently drawn a will, with the result that the legatee, who was to receive all of the testator's estate, got only one-eighth thereof, the Supreme Court held that the beneficiary could recover from the notary for damage sustained by reason of the invalidity of the will due to the notary's negligence, even though there was no privity of contract between them.

In the closing paragraph of the opinion, the court states: "We have concluded that plaintiff should be allowed recovery despite the absence of privity, and the cases of Buckley v. Gray, 110 Cal. 339 . . . , and Mickel v. Murphy, 147 Cal. App. 2d 718 . . , are disapproved insofar as they are in conflict with this decision." While the Supreme Court uses the word "disapproved," one of the connotations of that word is "reject," and that this language constitutes an over-

ruling has been declared in Johnson v. Holmes Tuttle Lincoln Merc. (1958), 160 Cal. App. 2d 290, 300, and hailed as a rejection of the old common law rule that privity of contract must exist in order for negligent performance of a contractual duty to give rise to liability for damage to an intangible economic interest. (United States v. Rogers & Rogers [1958], 161 F. Supp. 132, 135.)

We are of the opinion that under the doctrine of the Biakanja case, the applicability of Buckley v. Gray to the appellants' causes of action no longer exists, for as we review the history of privity and the assault made upon it in the interval between Buckley v. Gray of 1895 and Biakanja v. Irving of 1958, we observe that the rule expressed in the Buckley case was that of the general doctrine prevalent at that time, which had prevailed since 1842 and its pronouncement in the case of Winterbottom v. Wright, 152 Eng. Rep. 402, wherein it was asserted that a contracting party was not liable to a party not in privity for negligent performance of a contractual duty. This doctrine, as time went on, was rejected in the area of manufacturers' and suppliers' liability (see MacPherson v. Buick Motor Co. [1916], 111 N. E. 1050; Kalash v. Los Angeles Ladder Co. [1934], 1 Cal. 2d 229, 231.) The divergence no doubt is attributable to the probability that physical injury or property damage would result to third persons from negligence in the manufacture and supply of goods. On the other hand, where harm to intangible interests is the usual result of negligent performance of services, the doctrine main-

tained its strength. The breakthrough came in the case of Glanzer v. Shepard (1922), 233 N. Y. 236, wherein recovery was allowed for financial loss incurred by a third party due to negligence in the preparation of a certificate by a public weigher. The holding of the Glanzer case was restricted somewhat by Ultramares Corp. v. Touche (1931), 255 N. Y. 170, wherein third parties who had relied on negligently prepared accounting statements were denied recovery on the ground that this would create a potentially unlimited liability to a potentially unlimited class of persons. This in highlight was the status of the privity doctrine until our Supreme Court rendered its decision in the Biakanja case. In that case it stated, commencing at page 650:

> "The determination whether in a specific case the defendant will be held liable to a third person not in privity is a matter of policy and involves the balancing of various factors, among which are the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, and the policy of preventing future harm. (Cf. Prosser, Torts [2d ed. 1955], §§36, 88, 107, pp. 168, 172, 544-545, 747; 2 Harper and James, Torts [1956], §18.6, p. 1052.)"

and (in direct application to our state of alleged facts):

> "Here, the 'end and aim' of the transaction was to provide for the passing of Maroevich's estate

> to plaintiff. (See Glanzer v. Shepard, 233 N. Y. 236 [135 N. E. 275, 23 A.L.R. 1425].) Defendant must have been aware from the terms of the will itself that, if faulty solemnization caused the will to be invalid, plaintiff would suffer the very loss which occurred. As Maroevich died without revoking his will, plaintiff, but for defendant's negligence, would have received all of the Maroevich estate, and the fact that she received only one-eighth of the estate was directly caused by defendant's conduct."

We have given consideration to that portion of the opinion which refers to the fact that the notary engaged in the unauthorized practice of the law, a violation of section 6126 of the Business and Professions Code, and by its terms a misdemeanor, and the respondent's argument that the determinative factor in the Biakanja case was the unauthorized practice of law by the notary.

We believe, as did the court in the case of McDonald v. Foster Memorial Hospital (1959), 170 Cal. App. 2d 85, 95, that the reference to the notary's unauthorized practice of the law "appears to be dictum, incidental to the result reached."

It is sufficient for our purposes that in our opinion the Supreme Court established that lack of privity of contract will no longer bar a suit by a designated beneficiary of a will to recover for loss occasioned by an attorney's negligence in drawing the instrument. Rejection of the privity doctrine in this type of case is particularly justified because no other person can recover for the loss caused by the attorney's negligence.

Respondent earnestly contends that even if the lack of privity does not bar suit against him, nevertheless no actionable negligence was pleaded. The argument as we understand it is that the law with respect to the rules against perpetuities and the suspension of the power of alienation is so difficult that the ordinary lawyer who errs in their applicability cannot be charged with negligence. We agree the subject is difficult, but the law today has its specialties, and even as the general practitioner in medicine must seek the aid of the specialist in his profession, so the general practitioner in law, when faced with a problem beyond his capabilities, must turn to the expert in his profession to the end that his client is properly served. Further, this argument is pointless here, for in the Estate of Campbell (1938), 28 Cal. App. 2d 102, 106, a similar provision was held to violate the rules against perpetuities and suspension of the power of alienation. All that the respondent Hamm had to do in the present case was to examine the decisions of the courts of his own state and he would have had the answer to the problem he now says is confused and uncertain.

The rule of liability applicable here is that an attorney is liable for a want of sufficient skill, prudence and diligence as lawyers of ordinary skill and practice commonly possess and exercise. (Gambert v. Hart [1872], 44 Cal. 542, 552; Estate of Kruger [1900], 130 Cal. 621, 626; Moser v. Western Harness Racing Assn. [1948], 89 Cal. App. 2d 1, 7.)

Inclusion of such a provision in the will certainly presents a question as to the possession of the usual degree of skill and learning, and the use of that care, skill and diligence common to lawyers in practice in the community. The first count of the complaint alleges the inclusion of such a provision in the will which was void, and the respondent's advice which led appellants to settle for much less than they would have collectively received had a valid clause been used. Such allegations suffice to state a cause of action in negligence against the respondent.

The second count of the complaint alleges that the appellants were beneficiaries of the testator's contract with the respondent attorney for the drafting of the will, that the attorney breached his contract to their injury, and as third party beneficiaries they seek recovery for the damage thus caused.

Civil Code, section 1559, declares that a contract made expressly for the benefit of a third person may be enforced by him. As we have noted, the court in the Buckley case, supra, at page 347, held that a contract for drafting a will is not expressly made for the benefit of the legatees, in a legal sense, for the purpose of maintaining a suit under said Civil Code section; that it was of that class of cases where the benefit to the third person was merely incidental and conferred no right of action on the third person. (Wilson v. Shea [1916], 29 Cal. App. 788, 790.) However, in Johnson v. Holmes Tuttle Lincoln-Mere., supra, (hearing denied by the Supreme Court), it was held

that persons injured in an automobile accident were third party beneficiaries of a contract between a purchaser of a car and the dealer who agreed to insure the purchaser of the car, reliance being had upon the Biakanja case overruling Buckley, as it related to the question of third party beneficiaries. The respondent argues that such a construction of Biakanja is not correct because it did not involve a breach of contract question. We call attention to the language of that decision, at page 650, that the "end and aim" of an agreement to draft a will is to pass the testator's estate to the legatee. When this language is considered with respect to the determination of whether a party is a third party beneficiary of a contract made expressly for his benefit, it is hard to conceive of Biakanja not disposing of the Buckley rule as it affects the rights of a legatee as a third party beneficiary. The question as to whether or not a person will be held to be a third party beneficiary of a contract is one of intent. (Smith v. Anglo-California Trust Co. [1928], 205 Cal. 496, 502; Fruitvale Canning Co. v. Cotton [1953], 115 Cal. App. 2d 622, 625.) Our case presents a factor absent in Buckley, for here the appellants have pleaded that the testator's "primary and expressed intention" was to transmit a specific portion of his estate to them. This presents a factual question as to whether the legatees were express beneficiaries of the agreement to draft the will. So far as pleading the requisites for a breach of contract, the second count is sufficient.

The third count of the complaint alleges injury because certain releases were incomplete, improperly drawn, and not in conformity with good legal practice. Respondent's objection, in addition to that made to the first cause of action, and of which we have heretofore disposed, is that appellants do not state a cause of action because there is no allegation that the respondent could have obtained a different type of release. The objection is without merit, for it is established that a cause of action may be stated by alleging negligence in general terms without detailing the specific manner in which the injury occurred. (Guilliams v. Hollywood Hospital [1941], 18 Cal. 2d 97, 101.) If the respondent feels there is any merit in such a contention, it is a matter to be taken care of by defensive pleading, for he is the party in possession of the facts with regard thereto.

The complaint having properly stated the necessary facts to constitute a cause of action as to each of the counts therein contained, the judgment of dismissal heretofore entered must be reversed.

The judgment is reversed, and the cause remanded with directions to overrule the demurrer and to allow defendant to answer.

Shoemaker, J.

WE CONCUR:

Kaufman, P. J.

Draper, J.

Filed March 6, 1961.

Lawrence R. Elkington, Clerk.

Appendix 4

In the Supreme Court of the State of California
In Bank

S. F. 20,269

Robert Lucas et al.,
Plaintiffs and Appellants,
vs.
L. S. Hamm,
Defendant and Respondent.

Opinion

Plaintiffs, who are some of the beneficiaries under the will of Eugene H. Emmick, deceased, brought this action for damages against defendant L. S. Hamm, an attorney at law who had been engaged by the testator to prepare the will. They have appealed from a judgment of dismissal entered after an order sustaining a general demurrer to the second amended complaint without leave to amend.

The allegations of the first and second causes of action are summarized as follows: Defendant agreed with the testator, for a consideration, to prepare a will and codicils thereto for him by which plaintiffs were to be designated as beneficiaries of a trust provided for by paragraph Eighth of the will and were

to receive 15% of the residue as specified in that paragraph. Defendant, in violation of instructions and in breach of his contract, negligently prepared testamentary instruments containing phraseology that was invalid by virtue of section 715.2 and former sections 715.1 and 716 of the Civil Code relating to restraints on alienation and the rule against perpetuities.[1] Paragraph Eighth of these instruments "transmitted" the residual estate in trust and provided that the "trust shall cease and terminate at 12 o'clock noon on a day five years after the date upon which the order dis-

---

[1]Former section 715.1 of the Civil Code, as it read at the times involved here, provided: "The absolute power of alienation cannot be suspended, by any limitation or condition whatever, for a period longer than 21 years after some life in being at the creation of the interest and any period of gestation involved in the situation to which the limitation applies. The lives selected to govern the time of suspension must not be so numerous or so situated that evidence of their deaths is likely to be unreasonably difficult to obtain."

Section 715.2 reads as follows: "No interest in real or personal property shall be good unless it must vest, if at all, not later than 21 years after some life in being at the creation of the interest and any period of gestation involved in the situation to which the limitation applies. The lives selected to govern the time of vesting must not be so numerous or so situated that evidence of their deaths is likely to be unreasonably difficult to obtain. It is intended by the enactment of this section to make effective in this State the American common-law rule against perpetuities."

Former section 716, as it read at the times involved here, provided: "Every future interest is void in its creation which, by any possibility, may suspend the absolute power of alienation for a longer period than is prescribed in this chapter. Such power of alienation is suspended when there are no persons in being by whom an absolute interest in possession can be conveyed. The period of time during which an interest is destructible pursuant to the uncontrolled volition and for the exclusive personal benefit of the person having such a power of destruction is not to be included in determining the existence of a suspension of the absolute power of alienation or the permissible period for the vesting of an interest within the rule against perpetuities."

tributing the trust property to the trustee is made by the Court having jurisdiction over the probation of this will." After the death of the testator the instruments were admitted to probate. Subsequently, defendant, as draftsman of the instruments and as counsel of record for the executors, advised plaintiffs in writing that the residual trust provision was invalid and that plaintiffs would be deprived of the entire amount to which they would have been entitled if the provision had been valid unless they made a settlement with the blood relatives of the testator under which plaintiffs would receive a lesser amount than that provided for them by the testator. As the direct and proximate result of the negligence of defendant and his breach of contract in preparing the testamentary instruments and the written advice referred to above, plaintiffs were compelled to enter into a settlement under which they received a share of the estate amounting to $75,000 less than the sum which they would have received pursuant to testamentary instruments drafted in accordance with the directions of the testator.

(The third cause of action will be discussed separately because it concerns matters not involved in the first two counts.)

It was held in Buckley v. Gray, 110 Cal. 339, that an attorney who made a mistake in drafting a will was not liable for negligence or breach of contract to a person named in the will who was deprived of benefits as a result of the error. The court stated that an attorney is liable to his client alone with respect to actions based on negligence in the conduct of his pro-

fessional duties, and it was reasoned that there could be no recovery for mere negligence where there was no privity by contract or otherwise between the defendant and the person injured. (110 Cal. at pp. 342-343.) The court further concluded that there could be no recovery on the theory of a contract for the benefit of a third person, because the contract with the attorney was not expressly for the plaintiff's benefit and the testatrix only remotely intended the plaintiff to be benefited as a result of the contract. (110 Cal. at pp. 346-347.) For the reasons hereinafter stated the case is overruled.

The reasoning underlying the denial of tort liability in the Buckley case, i.e., the stringent privity test, was rejected in Biakanja v. Irving, 49 Cal.2d 647, 648-650, where we held that a notary public who, although not authorized to practice law, prepared a will but negligently failed to direct proper attestation was liable in tort to an intended beneficiary who was damaged because of the invalidity of the instrument. It was pointed out that since 1895, when Buckley was decided, the rule that in the absence of privity there was no liability for negligence committed in the performance of a contract had been greatly liberalized. (49 Cal.2d at p. 649.) In restating the rule it was said that the determination whether in a specific case the defendant will be held liable to a third person not in privity is a matter of policy and involves the balancing of various factors, among which are the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree

of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury, and the policy of preventing future harm. (49 Cal.2d at p. 650.) The same general principle must be applied in determining whether a beneficiary is entitled to bring an action for negligence in the drafting of a will when the instrument is drafted by an attorney rather than by a person not authorized to practice law.

Many of the factors which led to the conclusion that the notary public involved in Biakanja was liable are equally applicable here. As in Biakanja, one of the main purposes which the transaction between defendant and the testator intended to accomplish was to provide for the transfer of property to plaintiffs; the damage to plaintiffs in the event of invalidity of the bequest was clearly foreseeable; it became certain, upon the death of the testator without change of the will, that plaintiffs would have received the intended benefits but for the asserted negligence of defendant; and if persons such as plaintiffs are not permitted to recover for the loss resulting from negligence of the draftsman, no one would be able to do so, and the policy of preventing future harm would be impaired.

Since defendant was authorized to practice the profession of an attorney, we must consider an additional factor not present in Biakanja, namely, whether the recognition of liability to beneficiaries of wills negligently drawn by attorneys would impose an undue burden on the profession. Although in some situations liability could be large and unpredictable in amount,

this is also true of an attorney's liability to his client. We are of the view that the extension of his liability to beneficiaries injured by a negligently drawn will does not place an undue burden on the profession, particularly when we take into consideration that a contrary conclusion would cause the innocent beneficiary to bear the loss. The fact that the notary public involved in Biakanja was guilty of unauthorized practice of the law was only a minor factor in determining that he was liable, and the absence of the factor in the present case does not justify reaching a different result.

It follows that the lack of privity between plaintiffs and defendant does not preclude plaintiffs from maintaining an action in tort against defendant.

Neither do we agree with the holding in Buckley that beneficiaries damaged by an error in the drafting of a will cannot recover from the draftsman on the theory that they are third-party beneficiaries of the contract between him and the testator.[2] Obviously the main purpose of a contract for the drafting of a will is to accomplish the future transfer of the estate of the testator to the beneficiaries named in the will, and therefore it seems improper to hold, as was done in

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[2]It has been recognized in other jurisdictions that the client may recover in a contract action for failure of the attorney to carry out his agreement. (See 5 Am.Jur. 331; 49 N.Y.S.2d 1216, 1219-1221; Prosser, Selected Topics on the Law of Torts, 1954, pp. 413, 442. This is in accord with the general rule stated in Commercial Traders & General Ins. Co., 50 Cal.2d 654, 660: "that where an action sounds in both tort and contract, the plaintiff will ordinarily have the freedom of election between the two actions.

Buckley, that the testator intended only "remotely" to benefit those persons. It is true that under a contract for the benefit of a third person performance is usually to be rendered directly to the beneficiary, but this is not necessarily the case. (See Rest., Contracts, § 133, com. d; 2 Williston on Contracts (3rd ed. 1959) 829.) For example, where a life insurance policy lapsed because a bank failed to perform its agreement to pay the premiums out of the insured's bank account, it was held that after the insured's death the beneficiaries could recover against the bank as third-party beneficiaries. (Walker Bank & Trust Co. v. First Security Corp. (Utah) 341 P.2d 944, 945 et seq.) Persons who had agreed to procure liability insurance for the protection of the promisees but did not do so were also held liable to injured persons who would have been covered by the insurance, the courts stating that all persons who might be injured were third-party beneficiaries of the contracts to procure insurance. (Johnson v. Holmes Tuttle Lincoln-Merc., 160 Cal.App.2d 290, 296 et seq.; James Stewart & Co. v. Law (Tex.) 233 S.W. 2d 558, 561-562.) Since, in a situation like those presented here and in the Buckley case, the main purpose of the testator in making his agreement with the attorney is to benefit the persons named in his will and this intent can be effectuated, in the event of a breach by the attorney, only by giving the beneficiaries a right of action, we should recognize, as a matter of policy, that they are entitled to recover as third-party beneficiaries. (See 2 Williston on Contracts (3rd ed. 1959) pp. 843-844; 4 Corbin on Contracts (1951) pp. 8, 20.)

Section 1559 of the Civil Code, which provides for enforcement by a third person of a contract made "expressly" for his benefit, does not preclude this result. The effect of the section is to exclude enforcement by persons who are only incidentally or remotely benefited. (See Hartman Ranch Co. v. Associated Oil Co., 10 Cal.2d 232, 244; cf. 4 Corbin on Contracts (1951) pp. 23-24.) As we have seen, a contract for the drafting of a will unmistakably shows the intent of the testator to benefit the persons to be named in the will, and the attorney must necessarily understand this.

Defendant relies on language in Smith v. Anglo-California Trust Co., 205 Cal. 496, 502, and Fruitvale Canning Co. v. Cotton, 115 Cal.App.2d 622, 625, that to permit a third person to bring an action on a contract there must be "an intent clearly manifested by the promisor" to secure some benefit to the third person. This language, which was not necessary to the decision in either of the cases, is unfortunate. Insofar as intent to benefit a third person is important in determining his right to bring an action under a contract, it is sufficient that the promisor must have understood that the promisee had such intent. (Cf. Rest., Contracts, § 133, subds. 1(a) and 1(b); 4 Corbin on Contracts (1951) pp. 16-18; 2 Williston on Contracts (3rd ed. 1959) pp. 836-839.) No specific manifestation by the promisor of an intent to benefit the third person is required. The language relied on by defendant is disapproved to the extent that it is inconsistent with these views.

We conclude that intended beneficiaries of a will who lose their testamentary rights because of failure

of the attorney who drew the will to properly fulfill his obligations under his contract with the testator may recover as third-party beneficiaries.

However, an attorney is not liable either to his client or to a beneficiary under a will for errors of the kind alleged in the first and second causes of action.

The general rule with respect to the liability of an attorney for failure to properly perform his duties to his client is that the attorney, by accepting employment to give legal advice or to render other legal services, impliedly agrees to use such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of the tasks which they undertake in the area. (Estate of Kruger, 130 Cal. 621, 626; Moser v. Western Harness Racing Assn., 89 Cal.App.2d 1, 7; Armstrong v. Adams, 102 Cal.App. 677, 684; see Wade, The Attorney's Liability for Negligence (1959) 12 Vanderbilt Law Rev. 755, 762-765; 5 Am.Jur. 336.) The attorney is not liable for every mistake he may make in his practice; he is not, in the absence of an express agreement, an insurer of the soundness of his opinions or of the validity of an instrument that he is engaged to draft; and he is not liable for being in error as to a question of law on which reasonable doubt may be entertained by well-informed lawyers: (See Lally v. Kuster, 177 Cal. 783, 786; Savings Bank v. Ward, 100 U.S. 195, 198; 5 Am.Jur. 335; 7 C.J.S. 980.) These principles are equally applicable whether the plaintiff's claim is based on tort or breach of contract.

The complaint, as we have seen, alleges that defendant drafted the will in such a manner that the trust

was invalid because it violated the rules relating to perpetuities and restraints on alienation. These closely akin subjects have long perplexed the courts and the bar. Professor Gray, a leading authority in the field, stated: "There is something in the subject which seems to facilitate error. Perhaps it is because the mode of reasoning is unlike that with which lawyers are most familiar. . . . A long list might be formed of the demonstrable blunders with regard to its questions made by eminent men, blunders which they themselves have been sometimes the first to acknowledge; and there are few lawyers of any practice in drawing wills and settlements who have not at some time either fallen into the net which the Rule spreads for the unwary, or at least shuddered to think how narrowly they have escaped it." (Gray, The Rule Against Perpetuities (4th ed. 1942) p. xi; see also Leach, Perpetuities Legislation (1954) 67 Harv.L.Rev. 1349 [describing the rule as a "technicality-ridden legal nightmare" and a "dangerous instrumentality in the hands of most members of the bar"].) Of the California law on perpetuities and restraints it has been said that few, if any, areas of the law have been fraught with more confusion or concealed more traps for the unwary draftsman; that members of the bar, probate courts, and title insurance companies make errors in these matters; that the code provisions adopted in 1872 created a situation worse than if the matter had been left to the common law, and that the legislation adopted in 1951 (under which the will involved here was drawn), despite the best of intentions, added further complexities. (See 38 Cal.Jur.2d 443; Coil, Perpetuities and

Restraints; A Needed Reform (1955) 30 State Bar J. 87, 88-90.)

In view of the state of the law relating to perpetuities and restraints on alienation and the nature of the error, if any, assertedly made by defendant in preparing the instrument, it would not be proper to hold that defendant failed to use such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly exercise. The provision of the will quoted in the complaint, namely, that the trust was to terminate five years after the order of the probate court distributing the property to the trustee, could cause the trust to be invalid only because of the remote possibility that the order of distribution would be delayed for a period longer than a life in being at the creation of the interest plus 16 years (the 21-year statutory period less the five years specified in the will). Although it has been held that a possibility of this type could result in invalidity of a bequest (Estate of Johnston, 47 Cal.2d 265, 269-270; Estate of Campbell, 28 Cal.App.2d 102, 103 et seq.), the possible occurrence of such a delay was so remote and unlikely that an attorney of ordinary skill acting under the same circumstances might well have "fallen into the net which the Rule spreads for the unwary" and failed to recognize the danger. We need not decide whether the trust provision of the will was actually invalid or whether, as defendant asserts, the complaint fails to allege facts necessary to enable such a determination,[3]

[3]Defendant asserts that a provision of a will like the one quoted in the complaint could not cause a trust to be invalid unless it also appeared that there were contingent interests which could not vest

because we have concluded that in any event an error of the type relied on by plaintiffs does not show negligence or breach of contract on the part of defendant. It is apparent that plaintiffs have not stated and cannot state causes of action with respect to the first two counts, and the trial court did not abuse its discretion in denying leave to amend as to these counts.

The third cause of action contains additional allegations as follows: After admission of the will and codicils to probate, Harold Houghton Emmick, Walton Russell Emmick, Cleita Inez Spelman, and Retha Newell, hereinafter called the contestants, instituted a will contest. The executors, defendant, and the contestants tentatively reached a settlement agreement, subject to court approval, under which $10,000 would be paid to the contestants from the assets of the estate in return for which each contestant would sign an "appropriate release." Defendant was negligent in the performance of his duties in that he caused to be executed on behalf of the estate and those interested therein, including plaintiffs, releases which did not preclude the contestants from a subsequent attack upon the validity of the testamentary instruments. After complete execution of the releases and their transmittal to escrow but before approval of the compromise by the court, defendant was advised by competent counsel that the residual clause of the will and codicils was invalid as a violation of the rule against perpetuities and that as a consequence the phraseology of the

within the statutory time or that the trust could not be terminated by the beneficiaries acting together within the statutory period. (See Estate of Phelps, 182 Cal. 752, 759-760; Estate of Heberle, 155 Cal. 723, 726-727; Rest., Trusts, Second, § 337.)

releases was inadequate to protect the estate and persons interested therein, and defendant was requested by competent counsel to modify the releases and insert appropriate language suggested by counsel under which the contestants would release the estate and persons interested in it from any claims of whatsoever kind or nature. Defendant refused to do so and also refused to call the court's attention to the recommendations. As a consequence of the failure to direct the matter to the attention of the court, the order approving the compromise was made on the assumption that the releases would give adequate protection. The sum of $10,000 was paid to the contestants from the assets of the estate, and the releases were filed in the proceedings. Subsequently the contestants joined in a legal attack upon the validity of the residual clause of the will and codicils and by virtue of the invalidity of the clause participated in the settlement referred to above concerning paragraph Eighth of the will. If the releases had been prepared in accord with good legal practice they would have precluded such participation, with the result that plaintiffs would have received an additional sum of $15,000 from the estate.

This cause of action, unlike the first two, does not concern defendant's conduct as attorney for the testator, but, rather, asserted negligence by him when acting as attorney for the executors with respect to the execution of releases in the settlement of a will contest based on lack of testamentary capacity. It is undisputed that the releases were adequate to preclude

any further litigation of that contest, but plaintiffs assert that defendant had a duty to obtain releases which, in addition, would waive all other claims of the contestants against the estate and prevent them from subsequently attacking the validity of the trust provisions.

There are no allegations that the contestants, either at the time of the negotiations for the settlement or at the time of the signing of the releases, were willing to waive their rights to make other attacks upon the will after the settlement of that contest. In the absence of additional allegations we must assume that the agreed sum of $10,000 was intended solely for the settlement of the contest and the ground on which it was based, i.e., lack of testamentary capacity, and it would ordinarily be expected that the contestants would have demanded an additional sum for a more extensive waiver terminating their rights to attack the validity of the various provisions of the will. The written releases, of course, were required to conform to the settlement agreement. Under these circumstances it could well be argued that the attorneys for the contestants would have been derelict in their duty to their clients if they had approved broader releases. At most, under the allegations, defendant had a duty to request that the contestants sign broader releases, but there is no allegation that he failed to ask them to do so. The third count does not state a cause of action for negligence.

Although defendant pointed out in both the trial court and this court that there is no allegation that he

could have secured releases different from the ones given, plaintiffs make no claim that they can amend their complaint so as to cure the deficiency, and we cannot properly hold that the trial court abused its discretion in denying leave to amend.

The judgment is affirmed.

Gibson, C. J.

We concur:

Traynor, J.
Schauer, J.
McComb, J.
Peters, J.
White, J.
Dooling, J.

Filed September 5, 1961.
William I. Sullivan, Clerk.

Appendix 5

"1 Civil No. S.F. 20269

In the Supreme Court of the State of California

In Bank

Robert Lucas, Helen Lucas, Cyrene D. Lucas, Annette Lucas, and Cyrene D. Lucas, as Guardian of the Estate of Robert B. Lucas II, Cyrene Denison Lucas and James Lucas, Minors,
Plaintiffs, Appellants and Petitioners,

vs.

L. S. Hamm, First Doe, Second Doe, Third Doe, Fourth Doe and Fifth Doe,
Defendants and Respondents.

PETITION FOR REHEARING

After decision by the Supreme Court, State of California, in Bank, and numbered therein S.F. 20269

To the Honorable Phil S. Gibson, Chief Justice, and to the Honorable Associate Justices of the Supreme Court of the State of California:

Plaintiffs, appellants and petitioners respectfully request the above-entitled Honorable Court to grant a

Rehearing for the purpose of correcting the errors of law contained in the decision filed September 5, 1961, which errors are set forth herein.

I.

THE DECISION RESULTS IN A CLEAR VIOLATION OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION * * *"

Office-Supreme Court, U.S.
FILED
JAN 22 1962
JOHN F. DAVIS, CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1961

No. 641

ROBERT LUCAS, HELEN LUCAS, CYRENE D. LUCAS, ANNETTE LUCAS, and CYRENE D. LUCAS, as Guardian of the Estates of ROBERT B. LUCAS II, CYRENE DENISON LUCAS and JAMES LUCAS, Minors,

Petitioners,

vs.

L. S. HAMM, FIRST DOE, SECOND DOE, THIRD DOE, FOURTH DOE, and FIFTH DOE,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of California

BRIEF FOR RESPONDENT L. S. HAMM IN OPPOSITION

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1961

No. 641

ROBERT LUCAS, HELEN LUCAS, CYRENE D. LUCAS, ANNETTE LUCAS, and CYRENE D. LUCAS, as Guardian of the Estates of ROBERT B. LUCAS II, CYRENE DENISON LUCAS and JAMES LUCAS, Minors,

Petitioners,

vs.

L. S. HAMM, FIRST DOE, SECOND DOE, THIRD DOE, FOURTH DOE, and FIFTH DOE,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of California

BRIEF FOR RESPONDENT L. S. HAMM IN OPPOSITION

QUESTIONS PRESENTED

1. Whether the Supreme Court has jurisdiction under 28 U.S.C. Sec. 1257 to review by writ of certiorari the final judgment of the highest Court of a

state on the ground that petitioner has been denied due process of law, when the first time the question of such denial was raised was in a petition for rehearing in the highest Court of the state, which petition was denied without opinion.

2. Whether, in an action for negligence instituted in a state Court, a judgment dismissing the action for failure to state a cause of action under the law of the state is violative of the due process clause of the Fourteenth Amendment to the Constitution of the United States because the plaintiff is thus denied the opportunity to attempt to prove negligence.

ARGUMENT

Although we believe that this petition for writ of certiorari shows on its face that it is wholly without merit, it is perhaps a duty we owe the Court to state the reasons for our belief, even though the statement must necessarily be one of elementary principles of law. We do so, briefly.

I

12 U.S.C. SEC. 1257 DOES NOT AUTHORIZE REVIEW IN THIS CASE

Admittedly, the first time petitioners set up or claimed any right under the Fourteenth Amendment to the Constitution of the United States was in a petition for rehearing filed in the Supreme Court of

California after that Court had, by its final judgment, affirmed the judgment of the trial Court which dismissed the action after sustaining a special demurrer to the complaint on the ground that it failed to state a cause of action. [Petition pp. 9-10.]

This Court has repeatedly held that "it is too late to raise a Federal question for the first time in a petition for a rehearing, after the final judgment of the state court of last resort." *Consolidated Turnpike Co. v. Norfolk & O.V.R. Co.*, 228 U.S. 596, 331; *Hanson v. Denckla*, 357 U.S. 235; *American Surety Co. v. Baldwin*, 287 U.S. 156.

Under some circumstances an exception to this rule may exist if the state Court of last resort actually decides the question. See e.g. *Grimes v. Ordman*, 234 U.S. 385. But, as the record shows, the Supreme Court of California decided this case solely on California law and denied the petition for rehearing without opinion.

If by any conception there were in the case a question of invasion of rights under the Fourteenth Amendment, it cannot with justification be said that the question did not arise until the Supreme Court of California rendered its decision. That Court decided the case on the defendant's demurrer for failure of the complaint to state a cause of action. It was the demurrer which was before the trial Court and upon which the latter based its judgment dismissing the action. Necessarily, there existed the opportunity to raise in the trial court any questions that might be involved in an order sustaining the demurrer.

It is submitted that 12 U.S.C. Sec. 1257 does not authorize review of the judgment of the Supreme Court of the State of California in this case.

II

NO RIGHTS UNDER THE FOURTEENTH AMENDMENT ARE HERE INVOLVED

If we understand petitioners' contention, it is that in California every plaintiff who files a complaint in which he alleges that the facts which he pleads constitute negligence has a right under the Fourteenth Amendment to attempt to prove negligence in a jury trial, even though the Supreme Court of California holds that the complaint does not state a cause of action because as a matter of law the facts pleaded do not constitute actionable negligence.

This Court has answered the contention:

> "It is manifest that it was never contemplated by the framers of the Constitution that this court should sit in review, as an appellate court, of such a question as that presented by the record in the case at bar, viz., whether or not the highest court of a state erred in holding that it could rightfully determine from the statements in the pleadings filed by both parties to a controversy pending before it, that the averments of an answer set forth no defense to the claim of the plaintiff.
>
> "It was not a denial of a right protected by the Constitution of the United States to refuse a jury trial, even though it were clearly erroneous to

constitute the laws of the state as justifying the refusal."

Iowa Central Railway Company v. State of Iowa, 160 U.S. 389, 393.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Dated, San Francisco, California,
January 18, 1962.

Respectfully submitted,

ROBERT M. ADAMS, JR.,
MOSE SHAVERMAN,
Attorneys for Respondent
L. S. Hamm.

Supreme Court, U.S.
FILED
JUN 23 1962
JOHN F. DAVIS, CLERK

In the Supreme Court
of the
United States

October Term, 1961

No. 641

[redacted] Lucas, Helen Lucas, Ophelia D. [redacted], Executors and Ophelia D. [redacted], as Executrix of the estate of [redacted] H. Lucas II, Ophelia Denison Lucas and James Lucas, minors,

Petitioners,

vs.

L. S. Hand, First Doe, Second Doe, Third Doe, Fourth Doe and Fifth Doe,

Respondents.

PETITIONERS' REPLY BRIEF

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1961

No. 641

ROBERT LUCAS, HELEN LUCAS, CYRENE D. LUCAS, ANNETTE LUCAS and CYRENE D. LUCAS, as guardian of the estates of Robert B. Lucas II, Cyrene Denison Lucas and James Lucas, minors,

Petitioners,

vs.

L. S. HAMM, FIRST DOE, SECOND DOE, THIRD DOE, FOURTH DOE and FIFTH DOE,

Respondents.

PETITIONERS' REPLY BRIEF

I.

RESPONDENT INCORRECTLY CITES QUESTIONS PRESENTED

Respondent emphasizes the point that the federal question was raised for the first time in a petition for

rehearing in the highest court of the State of California. The question of denial of due process of law in violation of the Fourteenth Amendment to the United States Constitution was *immediately* raised by petitioners when for the first time in the entire course of litigation and in an unexpected manner the Supreme Court of the State of California functioning as an appellate tribunal departed from the opinions and theories of the trial and lower appellate courts and decided de novo, without any evidence before it, that children were not protected by the Fourteenth Amendment to the Constitution of the United States if their adversary had the good fortune to be a lawyer. (Petition herein, pages 9 and 10, and appendices, 1, 2 and 3 thereto.)

The second part of the claimed question presented states erroneously that the action was for negligence. It is to be emphasized that this is not an action limited to negligence but on the contrary relates to breach of contract also. The judgment of the trial court sustained a demurrer without leave to amend without any evidence before it upon the sole ground that the trial judge believed (erroneously as was later established) that a beneficiary of a will could not sue a lawyer for damages resulting from an error in draftsmanship either upon the theory of tort or contract. The opinion of the trial judge is clearly set forth in the petition and in the record and is appended to the petition as appendix 1 thereof. The District Court of Appeal reversed the aforesaid opinion and judgment and unequivocally stated that such

an action was proper both upon the theory of tort and contract. (Appendix 3 of petition.) The Supreme Court of the State of California stated that such an action was proper both upon the theory of tort and upon the theory of contract, but thereafter incorporated by reference the wisdom of a Harvard law professor as a substitute for the legislative function. (Appendix 4 of petition.) Therefore, petitioners herein inquire as follows: Under what law of what state were they prevented from having a trial for the purpose of introducing evidence upon the tort and contract in question? This is a case of first impression and there never has been a case decided without any evidence wherein it has been held that the law of future interests as a matter of law is too difficult for a lawyer to understand. The children, petitioners herein, were not only denied the opportunity to prove negligence, but in addition thereto they were denied the opportunity to prove by competent evidence the terms and provisions of the contract, the breach of which was admitted by respondent lawyer.

II.

28 USCA SECTION 1257 AUTHORIZES REVIEW IN THIS CASE

It is clear that the Supreme Court of the State of California actually decided the question relating to denial of due process of law in violation of the Fourteenth Amendment to the United States Constitution for the first time. (Appendices 1 through 5 of peti-

tion.) The trial court merely said that a beneficiary of a will could not sue the draftsman thereof. (Appendix 1 of petition.) On appeal, the District Court of Appeal said the beneficiary could sue a lawyer on the theories of tort and contract. Hence, for the first time, a new law was established in the State of California. (Appendix 3 of petition.) In answer to the plea for professional immunity requested by respondent herein in the arguments propounded before the District Court of Appeal, the aforesaid tribunal unanimously stated in part as follows:

> "Respondent earnestly contends that even if the lack of privity does not bar suit against him, nevertheless no actionable negligence was pleaded. The argument, as we understand it, is that the law with respect to the rules against perpetuities and the suspension of the power of alienation is so difficult that the ordinary lawyer who errs in their applicability cannot be charged with negligence. We agree the subject is difficult, but the law today has its specialties, and even as the general practitioner in medicine must seek the aid of the specialist in his profession, so the general practitioner in law, when faced with a problem beyond his capabilities, must turn to the expert in his profession to the end that his client is properly served. Further, *this argument is pointless here*, for in the *Estate of Campbell* (1938), 28 C.A. 2d 102, 106, a similar provision was held to violate the rules against perpetuities and suspension of the power of alienation. All that the respondent Hamm had to do in the present case was to examine the decisions of the courts of his own state and he would have had the

answer to the problem he now says is confused and uncertain." (Appendix 3, petition, page xiv.)

The Supreme Court of the State of California said that the beneficiaries of a will can sue the lawyer on the theory of tort and contract, but that the subject of future interests was too difficult to understand, at least in the opinion of Professor Leach of Harvard University, which opinion was adopted and, therefore, without permitting any evidence on the subject, the actions should be and were dismissed. The subjects of negligence and breach of contract are, of course, relative and depend for their solution upon questions of fact. This is in accordance with basic principles of American law and the existing law in the State of California. (Petition and cases cited therein.)

The Supreme Court of the State of California is constitutionally constituted as an appellate tribunal. It is not a fact-finding tribunal. Therefore, its decision concerning questions of fact without any evidence before it is void on its face because the Supreme Court lacked jurisdiction in this particular case to decide questions which, from the inception of our system of jurisprudence, depend for their solution upon facts established incident to procedural safeguards. This was the first time in the entire proceeding described herein that the federal question had been presented. It was a complete surprise. There was no precedent thereto. There are no prior cases concerning this subject. Petitioners immediately raised the federal question within the time required

by law. (See record presented herewith and appendix 5 attached to petition.)

As stated in the case of *Granis v. Ordean*, 234 U.S. 385, it was the decision of the Supreme Court of the State of California that ran counter to the constitutional right of petitioners herein. The prior decisions of the trial court and the District Court of Appeal at no time ran counter to their said rights.

III.

BASIC RIGHTS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION ARE DIRECTLY INVOLVED HEREIN

Respondent misstates the record by alleging that petitioners merely pleaded negligence in their causes of action. The statement of the case, as set forth on page 4 et seq. of the petition, correctly shows the nature of the proceedings. Also, the record presented herewith indicates that petitioners alleged three separate and distinct causes of action. The first cause of action was predicated upon negligence relating to carelessness in drafting a will and codicils thereto. The second cause of action related to breaches of contract wherein a third-party beneficiary contract and supplements thereto entered into by and between the testator and the respondent lawyer for the benefit of petitioners as beneficiaries under testamentary instruments were continuously breached. The third cause of action related to carelessness and negligence relative to the conduct of respondent herein as counsel for a $3,000,000 estate.

These causes of action were pleaded in conformity with the applicable procedural requirements as imposed by the legislature of the State of California. Each cause of action in and of itself is, in accordance with the laws of the State of California, separate, distinct and properly pleaded. The words "negligence", "breach of contract" and "carelessness" are relative and the element of relativity, is of course, predicated upon circumstances which, in turn, can only be proved by competent evidence introduced pursuant to procedural safeguards. The word "relative" means relative to fact and fact can only be established by evidence, and there was a total deprivation of the privilege of introducing any evidence occasioned by the decision of the Supreme Court of California in this case.

Inasmuch as the trial court erroneously believed that a beneficiary under a will could not sue a lawyer and based its decision solely upon that point (appendix 1, petition), the first time that the question of whether or not the law of future interests should have been too difficult for this particular respondent was decided adversely to petitioners by a tribunal was the decision of the Supreme Court of the State of California. Aside from the fact that no evidence was permitted relative to this question of fact, the Supreme Court of California lacks jurisdiction over this particular question because constitutionally it is constituted an appellate tribunal and it cannot under any law or procedural rule existing in the State of California sit de novo as a trial court without any evidence before it.

As the learned B. E. Witkin, noted California author in the field of jurisprudence, stated in his 1961 supplement to California Procedure:

> "It would appear from the opinion in the case of *Lucas v. Hamm* that, in actions against an attorney, negligence is not in any meaningful sense a question of fact for the lower court, but is one of law on which the appellate court exercises an independent judgment."

He further stated:

> "In reaching this conclusion the court almost takes the position that no lawyer can be held responsible for mistakes in regard to perpetuities and suspension of alienation." Witkin, California Procedure, Vol. 1 1961 Supp.—Attorneys—Section 59A, Page 27.

It is obvious that there is no legal precedent for this unique decision, that there is a total absence of any reason therefor and that the impact of the decision is to shatter constitutional safeguards at the expense of children for the benefit of the members of the legal profession. This profession is by the very nature of things the fiduciary entrusted with the preservation of sacred constitutional guarantees. In propria causa nemo judex—no one can be a judge in his own cause.

IV.

THE CASES CITED BY RESPONDENT ARE NOT APPLICABLE TO HIS POSITION HEREIN

The case of *Consolidated Turnpike Co. v. Norfolk O.V.R. Co.*, 228 U.S. 326 at 334; *Hanson v. Denckla*, 357 U.S. 235, and *American Surety Co. v. Baldwin*, 287 U.S. 156, are clearly not applicable because as has been indicated herein the first time the violation in question was caused by a court, was at the time the Supreme Court of the State of California attempted to exceed its jurisdiction and decide a question of fact without any evidence before it concerning a case of first impression in the jurisprudence of the United States. The case of *Granis v. Ordean*, 234 U.S. 385, is in favor of the position asserted by petitioners herein. As stated therein, it was the decision of the Supreme Court of the State of California that first ran counter to the constitutional rights of petitioners herein.

The case of *Iowa Central Railway Company v. State of Iowa*, 160 U.S. 389, 393, is not in point. In this case, the petitioners herein assert the right to a trial, the right to produce evidence at the trial, the right to produce evidence at a trial before a tribunal with jurisdiction conferred by the Constitution of the State of California, as distinguished from an appellate tribunal constitutionally established to review decisions of a trial court after evidence has been adduced. Whether the trial which petitioners demand is by a court or a jury is beside the point at this particular time. Petitioners merely want a trial.

They want their day in court in a court constitutionally established to have jurisdiction upon such a controversy and a court constitutionally established wherein evidence can be adduced and, of final significance, they wish the opportunity to present evidence. In the *Iowa* case cited by respondent, the question related to whether or not the petitioner for the writ of certiorari was entitled to a jury as distinguished from a court trial. This distinguishing characteristic is not present in this case. Petitioners herein merely want a trial. It is their position that the Supreme Court of the State of California lacks jurisdiction of the subject matter and in its proceeding it violated the constitutional rights guaranteed petitioners herein. This case requires a *fair* opportunity to be heard, to wit, a trial. The *Iowa* case merely stated that the Constitution merely guaranteed a fair opportunity for hearing. In the aforesaid *Iowa* case, the court stated in part as follows:

> "But it is clear that the Fourteenth Amendment in no way undertakes to control the power of a state to determine by what legal process legal rights may be asserted or legal obligations be enforced *provided* the method of procedure adopted for these purposes gives reasonable notice and affords fair opportunity to be heard before the issues are decided."

It is clear, therefore, that the Supreme Court of the State of California in this particular case was completely without jurisdiction in its decision. It is an appellate tribunal and not a trial court. There was no evidence introduced in this case. There is no precedent

for the procedural aspect thereof and there is no precedent legally for the strange and shocking conclusion reached by the Supreme Court of the State of California. This is a case of first impression in the jurisprudence of the world. Disposition thereof should be in conformity with guaranteed democratic principles.

For the foregoing re. sons, it is respectfully submitted that the Supreme Court of the United States should issue a writ of certiorari in order that this case may be reconsidered and decided commensurate with principles of law applicable thereto and in accordance with the constitutional guarantees incident to the Fourteenth Amendment to the United States Constitution.

Dated, January 20, 1962.

REGINALD G. HEARN,
Attorney for Petitioners.